

ALVERSON, TAYLOR, MORTENSEN & SANDERS

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11 Attorney for Plaintiffs

12 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA.

13 DISH NETWORK L.L.C., a Colorado Limited
14 Liability Company, ECHOSTAR
TECHNOLOGIES L.L.C., a Texas Limited
15 Liability Company, and NAGRASTAR L.L.C., a
Colorado Limited Liability Company,

16 Plaintiffs

17 v.

18 DARRYL POLO, aka "THEPIMP" and aka "DJP"
19 dba www.fta-spot.com, www.ftapimps.com, and
The Media Creative Group ("TMC")

20 Defendant

CASE NO: 2:10-cv-01374-PMP-LRL

22 **MOTION FOR RELIEF FROM ORDER AND FOR EXTENSION OF TIME**

23 COME NOW Plaintiffs DISH NETWORK L.L.C., ECHOSTAR TECHNOLOGIES L.L.C.,
24 and NAGRASTAR L.L.C. by and through their counsel of record, and hereby bring this Motion for

1 Relief from Order and for Extension of Time.

2 This motion is made and based upon the papers and pleadings on file herein, the attached
3 exhibits, the points and authorities submitted in support hereof, and such oral argument as may be
4 entertained by the Court at the hearing of this Motion.

5 **THE MOTION**

6 I. **Relief Sought**

7 On February 28, 2011 this Court held a status conference in the above captioned civil action.
8 The Plaintiffs submit that at said conference local counsel for the Plaintiffs informed the Court that
9 settlement appeared imminent but that the Plaintiffs were still awaiting the receipt of the hardcopy
10 settlement documentation from the Defendant and that upon receipt of same the Plaintiffs intended
11 to proceed by way of a Motion for Judgment by stipulation. After the hearing, this Court entered an
12 Order, Docket entry # 29 ("the subject order"), giving the Plaintiffs until March 28, 2011 to file a
13 "Stipulation of Dismissal". The Plaintiffs are seeking relief from the subject order. Specifically, the
14 Plaintiffs seek an order:

- 15 1. Granting the Plaintiffs until April 22, 2011 to file settlement documentation;
- 16 2. Allowing the Plaintiffs' settlement documentation to include a Motion for Judgment by
17 Stipulation; and
- 18 3. Should the Defendant continue to fail to deliver the executed settlement documentation to
19 the Plaintiffs (see below) granting the Plaintiffs leave to continue with the Civil Action,
20 including leave to file a Motion for the Clerk's entry of Default against the Defendant.

21 II. **Grounds for Relief**

22 The Plaintiffs are seeking relief from that portion of the subject Order which provides that
23 the parties are to file a "Stipulation of Dismissal" because the Plaintiffs believe that this portion of
24 the Order came about through some type of clerical error. The Plaintiffs have always intended on

1 resolving this matter through a Motion for Judgment by Stipulation. The Plaintiffs' local counsel has
 2 filed a Declaration stating that he referenced this fact during the status conference on February 28,
 3 2011. Pursuant to Rule 60(a) and/or other inherent powers of this Court, the Court can modify the
 4 Order to reflect the fact that the Parties may utilize a Motion for Judgment by Stipulation to resolve
 5 this matter and the Plaintiffs have set forth good cause for such relief.

6 The Plaintiffs are also seeking relief from the portion of the Order that requires the settlement
 7 documentation to be filed on or before March 28, 2011. The Plaintiffs need more time to try to
 8 effectuate the settlement by way of a Motion for Judgment by Stipulation but if the Defendant
 9 continues to not abide by his promise to deliver the executed settlement documentation to the
 10 Plaintiffs the Plaintiffs seek leave to continue with the civil action including leave to allow the
 11 Plaintiffs to move for Default against the Defendant. The Defendant's failure to deliver the executed
 12 settlement documentation after specifically promising to do so amounts to a repudiation of the
 13 settlement agreement bordering on misconduct which sets forth good cause and exceptional
 14 circumstances to justify relief from the Court's order pursuant to Rule 60(b)(6) and/or other inherent
 15 powers of this Court.

16 In further support of this Motion please see the Declaration of Andres Camacho, the
 17 Plaintiffs' local counsel who attended the hearing on February 28, 2011, the Declaration of John M.
 18 McLaughlin, the Plaintiffs' lead counsel, and the Proposed Order filed herewith.

19 **INCORPORATED MEMORANDUM OF LAW**

20 **I. FACTS**

21 The Plaintiffs have filed declarations that set forth what they contend are the facts as
 22 pertaining to this Motion. Additionally, the Plaintiffs incorporate the various documents and orders
 23 of record in this civil action.

24 ...

1 1. After a Motion by the Plaintiffs, this Court granted the *Pro Se* Defendant additional time to
2 file a responsive pleading and this Court continued a scheduling conference in this matter to
3 grant the Parties time to attempt to reach a negotiated settlement. (Docket entry # 26 and #
4 27)

5 2. During this period of time the Plaintiffs' lead counsel and the Defendant were in contact
6 and they attempted to negotiate a settlement to the matter. (McLaughlin Declaration
7 paragraph # 5)

8 3. In fact, it appeared that the parties had reached an agreement as to the pertinent terms of the
9 settlement. The settlement called for the Parties executing a Settlement Agreement and a
10 Stipulation for Judgment. (McLaughlin Declaration paragraph # 6)

11 4. Once the Plaintiffs' lead counsel obtained these executed hardcopy settlement documents
12 the Plaintiffs' lead counsel was to file a Motion for Judgment by Stipulation. (McLaughlin
13 Declaration paragraph # 7)

14 5. On February 25, 2011 the Defendant sent an executed PDF of the Settlement Agreement to
15 the Plaintiffs' lead counsel. (McLaughlin Declaration paragraph # 8)

16 6. The Plaintiffs' lead counsel then informed the Defendant that he must also execute the
17 stipulation and send hard copy of the executed stipulation and executed agreement to
18 Plaintiffs' lead counsel's office. (McLaughlin Declaration paragraph # 9)

19 7. On February 25, 2011 the Defendant sent an e-mail message to the Plaintiffs' lead counsel
20 asking him what physical address the documents were to be sent. (McLaughlin Declaration
21 paragraph # 10) (See **Exhibit A** McLaughlin Declaration).

22 8. The Plaintiffs' lead counsel responded to the Defendant's e-mail message by giving the
23 Defendant the Plaintiffs' lead counsel's address in Massachusetts. (McLaughlin Declaration
24 paragraph # 11) (See **Exhibit A** McLaughlin Declaration).

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1 9. . On February 28, 2011 the Plaintiffs' local counsel attended the scheduling conference in
2 this action. At that hearing he informed the Court that:
3 a. Settlement appeared imminent but that the Plaintiffs were still awaiting the
4 delivery of the pertinent settlement documentation from the Defendant (Camacho
5 Declaration paragraph # 5);
6 b. The Plaintiffs intended to resolve this civil action by way of a Stipulation for
7 Judgment. (Camacho Declaration paragraph # 6); and
8 c. The Court did not raise any objections as to utilizing a Stipulation for Judgment to
9 resolve this civil action (Camacho Declaration paragraph # 7).
10 10. On February 28, 2011 the Court entered an Order giving the Plaintiffs until March 28, 2011
11 to file a *Stipulation of Dismissal*. (Docket entry # 29)
12 11. The settlement documents were never received by the Plaintiffs' lead counsel. (McLaughlin
13 Declaration paragraph # 14)
14 12. The Plaintiffs' lead counsel has attempted to communicate with the Defendant by leaving
15 multiple phone messages and sending him multiple e-mail messages for weeks but there has
16 been no communication from the Defendant. In fact, the last communication from the
17 Defendant was his electronic message inquiring as to what physical address he should send
18 the documents. (McLaughlin Declaration paragraph # 15)
19 13. The Plaintiffs are now seeking relief from the existing Court Order to give them more time
20 to attempt to effectuate settlement in this matter through a Motion for Judgment by
21 Stipulation and should the Defendant continue to fail to deliver the settlement
22 documentation to the Plaintiffs, allow the Plaintiffs to continue on with this Civil Action
23 including leave to seek a default against the Defendant. (McLaughlin Declaration paragraph
24 # 16)

1 **II. DISCUSSION AND AUTHORITIES**

2 Federal Rule of Civil Procedure Rule 60 (a) provides in part “The court may correct a clerical
 3 mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order,
 4 or other part of the record. The court may do so on motion or on its own, with or without notice ...”.
 5 The Plaintiffs have moved for relief from that portion of the subject order which provides that the
 6 parties are obligated to file a Stipulation of Dismissal based upon this provision.

7 At the hearing on February 28, 2010 the Plaintiffs’ local counsel reported to the Court that
 8 the Plaintiffs intended to resolve this case through a Stipulated Judgment but that the Plaintiffs were
 9 still awaiting the settlement documents from the Defendant. At the hearing on February 28, 2010 the
 10 Court did not express any reservations regarding utilizing a stipulated judgment to resolve this civil
 11 action.

12 Based upon these facts it can be inferred that the reference in the Order to a “Stipulation of
 13 Dismissal” came about through some type of clerical error. It does not appear that the Court truly
 14 intended to restrict settlement of this matter such that settlement could only be effectuated by
 15 Stipulation of Dismissal. Accordingly, it does not appear that the Court intended to have the
 16 language “Stipulation of Dismissal” in the Order. This is precisely the type of clerical error
 17 contained in an Order to which relief can be had pursuant to Federal Rule of Civil Procedure Rule
 18 60 (a). “Errors correctable under Rule 60(a) include those where what is written or recorded is not
 19 what the court intended to write or record” *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir.1987).

20 Accordingly, the Plaintiffs have set forth good grounds for the relief being sought pursuant to
 21 Federal Rule of Civil Procedure Rule 60 (a) and this Motion is timely in that said provision allows
 22 for the Motion to be brought “whenever” a clerical error is found.

23 Federal Rule of Civil Procedure Rule 60 (b)(6) provides that “On motion and just terms, the
 24 court may relieve a party or its legal representative from a final judgment, order, or proceeding for

1 the following reasons: (6) any other reason that justifies relief.”

2 Based upon in the declarations filed in support of this motion the Plaintiffs have set forth
3 herein un-controverted facts that:

- 4 1. Before the Hearing on February 28, 2011 the Defendant had stated in an electronic message
5 to the Plaintiffs’ lead counsel that he was sending hardcopy of the settlement agreement and
6 the Stipulation for Judgment;
- 7 2. At the hearing on February 28, 2011 the Plaintiffs’ local counsel reported to the Court that
8 the Plaintiffs were still awaiting a hardcopy of the settlement documentation from the
9 Defendant;
- 10 3. The settlement documentation has never been received by the Plaintiffs’ lead counsel from
11 the Defendant;
- 12 4. The Plaintiffs’ lead counsel has repeatedly attempted to make contact with the Defendant to
13 no avail.

14 These facts amount the Defendant repudiating the Settlement Agreement and could also
15 possibly amount to misconduct on the part of the Defendant. Repudiating a settlement agreement in
16 such a manner constitutes an extraordinary circumstance, and it justifies relief from this Court’s
17 Order pursuant to Rule 60 (b)(6). See *Keeling v. Sheet Metal Workers Int’l Assn.*, 937 F.2d 408,
18 (CA9 1991). Other courts have also found that the repudiation of a settlement agreement that
19 terminated litigation pending before a court constitutes an extraordinary circumstance, justifying
20 vacating the court’s prior dismissal order. *United States v. Baus*, 834 F.2d 1114, 1124 (1st Cir.1987);
21 *Fairfax Countywide Citizens v. Fairfax County*, 571 F.2d 1299, 1302-03 (4th Cir.), *cert. denied*, 439
22 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371
23 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); *VanLeeuwen v. Farm*
24 *Credit Admin.*, 600 F.Supp. 1161, 1164, 1167 (D.Or.1984).

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1 In fact, the facts in this case are even more compelling than the facts in the *Keeling* case. In
2 the *Keeling* case the District Court granted relief to a party where the other party had repudiated a
3 settlement agreement after the civil action had been dismissed. In this case the Plaintiffs are seeking
4 relief from a procedural order before the case has been dismissed. Additionally, while the Plaintiffs
5 believed that a settlement would be forthcoming by way of a Stipulation for Judgment the Plaintiffs'
6 local counsel clearly reported to the Court at the hearing on February 28, 2011 that the Plaintiffs
7 were still awaiting receipt of the settlement documentation from the Defendant.

8 Accordingly, the Plaintiffs have set forth good cause for the relief being sought pursuant to
9 Rule 60 (b)(6). This Motion is timely in that subsection (c) of Rule 60 provides that such a motion
10 must be made within a "reasonable time". The Plaintiffs have made this Motion within a reasonable
11 time. The Plaintiffs gave the Defendant some reasonable time to execute and deliver the settlement
12 documentation. As soon as it became clear that the Defendant was not responding to any inquiries,
13 phone calls, or electronic messaging, the Plaintiffs brought this Motion and they brought this Motion
14 well before the date set forth in any order for the filing of the settlement documentation.

15 ...

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24 ...

CONCLUSION

Based upon the reasoning and authorities set forth above, the Plaintiffs contend that this Court granted relief as set forth on the Proposed Order which is filed herewith.

ALVERSON, TAYLOR
MORTENSEN & SANDERS

/s/ Karie N. Wilson
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/s/John M. McLaughlin
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jmclaughlin@greenmiles.com

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CERTIFICATE OF SERVICE

2 **I HEREBY CERTIFY** that on March 25th, 2011 I electronically filed the foregoing motion
3 the related declarations and the related proposed order with the Clerk of the Court using the
4 CM/ECF system. I further certify that I sent by 1st class mail, postage prepaid, said documents and
5 the notice of electronic filing to the following non-CM/ECF participant:

6 Darryl Polo
7637 Muirfield Drive
7 Las Vegas, NV 89147

Frank
Lockwood

Employee of ALVERSON, TAYLOR,
MORTENSEN & SANDERS

n:\bruce.grp\z-client\18888\pleadings\mtn relief order.doc

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18 v.

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20 dba www.fta-spot.com, www.ftapimps.com, and

21 The Media Creative Group ("TMC")

22 Defendant

CASE NO: 2:10-cv-01374-PMP-LRL

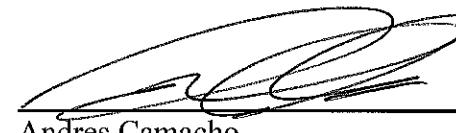
22 **DECLARATION OF ANDRES CAMACHO IN SUPPORT OF PLAINTIFFS'**
MOTION FOR RELIEF FROM ORDER AND FOR EXTENSION OF TIME

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1 Andres Camacho declares and says:

- 2 1. My name is Andres Camacho.
- 3 2. I am an associate at the law firm of Alverson Taylor Mortensen & Sanders, local counsel
- 4 for the Plaintiffs in the above referenced Civil Action.
- 5 3. I am making this declaration in support of the Plaintiffs' Motion for Relief from Order
- 6 and for Extension of Time.
- 7 4. On February 28, 2011 I attended the scheduling conference in this action
- 8 5. At said hearing I reported to the Court that settlement appeared imminent but that the
- 9 Plaintiffs were awaiting the delivery of the pertinent settlement documentation from the
- 10 Defendant.
- 11 6. At said hearing I reported to the Court that the Plaintiffs intended to resolve this civil
- 12 action by way of a Stipulation for Judgment.
- 13 7. At said hearing the Court did not raise any objections as to utilizing a Stipulation for
- 14 Judgment to resolve this civil action.
- 15 8. I have not received the settlement documents from the Defendant.

16 I declare this 25th day of March, 2011 under penalty of perjury under the laws of the United
17 States of America that the foregoing is true and correct.



18
19 Andres Camacho
20
21
22
23
24

1 J. BRUCE ALVERSON, ESQ.
2 Nevada Bar No. 1339
3 KARIE N. WILSON, ESQ.
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21 **UNITED STATES DISTRICT COURT**
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24 Liability Company, ECHOSTAR
TECHNOLOGIES L.L.C., a Texas Limited
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DARRYL POLO, aka "THEPIMP" and aka "DJP"
dba www.fta-spot.com, www.ftapimps.com, and
The Media Creative Group ("TMC")

Defendant

CASE NO: 2:10-cv-01374-PMP-LRL

21
22 **DECLARATION OF JOHN M. MCLAUGHLIN IN SUPPORT OF PLAINTIFFS'**
23 **MOTION FOR RELIEF FROM ORDER AND FOR EXTENSION OF TIME**

24

1 John McLaughlin declares and says:

- 2 1. My name is John McLaughlin.
- 3 2. I am lead counsel for the Plaintiffs in the above referenced Civil Action.
- 4 3. I am making this declaration in support of the Plaintiffs' Motion for Relief from Order
- 5 and Extension of Time.
- 6 4. After a motion by the Plaintiffs this Court granted the *Pro Se* Defendant additional time
- 7 to file a responsive pleading and this Court continued a scheduling conference to grant
- 8 the Parties time to attempt to reach a negotiated settlement to this matter.
- 9 5. I was in serious, substantive settlement negotiations with the Defendant.
- 10 6. I thought we had reached an agreement as to the pertinent terms of the settlement. The
- 11 settlement called for the Parties executing a Settlement Agreement and a Stipulation for
- 12 Judgment.
- 13 7. Once I obtained these executed hardcopy settlement documents I was going to file a
- 14 Motion for Judgment by Stipulation.
- 15 8. On February 25, 2011, I received an executed PDF of the Settlement Agreement from the
- 16 Defendant.
- 17 9. I informed the Defendant that he must also execute the Stipulation and send hard copies
- 18 of both the executed stipulation and agreement to my office.
- 19 10. On February 25, 2011 the Defendant sent me an e-mail asking what physical address the
- 20 documents were to be sent to (**Exhibit A**).
- 21 11. I responded to the Defendant's e-mail message by giving him my office address in
- 22 Massachusetts. (**Exhibit A**).
- 23 12. On February 28, there was a scheduling conference in this action which my local counsel
- 24 attended.

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1 13. That same day, the Court entered an Order giving the Plaintiffs until March 28, 2011 to
2 file a *Stipulation of Dismissal*.
3 14. I never received the settlement documents from the Defendant.
4 15. I have attempted to communicate with the Defendant by leaving multiple phone messages
5 and sending multiple e-mail messages for weeks but there has been no communication
6 from the Defendant. In fact, the last communication I had from the Defendant was his
7 electronic message inquiring as to what physical address he should send the settlement
8 documents.
9 16. I'm now filing a Motion on behalf of the Plaintiffs seeking relief from the existing Court
10 Order to give them more time in which I will still to attempt to effectuate settlement in
11 this matter through a Motion for Judgment by Stipulation. Yet, should the Defendant
12 continue to fail to deliver the settlement documentation to the Plaintiffs, we are asking
13 the Court to allow the Plaintiffs to continue on with this Civil Action, including leave to
14 seek a Default against the Defendant

15 I declare this 25th day of March 2011 under penalty of perjury under the laws of the United States of
16 America that the foregoing is true and correct.
17
18

19 /s/ John M. McLaughlin
20 John M. McLaughlin
21
22
23
24

EXHIBIT A

John McLaughlin

From: John McLaughlin
Sent: Friday, February 25, 2011 2:06 PM
To: 'darryl polo'
Subject: RE: RE:

JOHN M MCLAUGHLIN, ESQ.
GREEN, MILES, LIPTON &
FITZ-GIBBON, LLP
77 Pleasant St; P.O. Box 210
Northampton, MA 01061-0210
413-586-0865 Phone
413-584-6278 Fax

You can send with delivery for Monday. If you use FedEx you do not need the P.O. Box number. If you use overnight mail for the US mail then utilize the P.O. Box number. Thank you

From: darryl polo [mailto:darrylpolo@live.com]
Sent: Friday, February 25, 2011 2:00 PM
To: John McLaughlin
Subject: RE:

yes, what is your address?

From: johnm@greenmiles.com
To: johnm@greenmiles.com; darrylpolo@live.com
Date: Fri, 25 Feb 2011 13:37:59 -0500
Subject: RE: RE:

Mr. Polo, please send me by FedEx to executed hardcopies of the settlement agreement and one executed hardcopy of the stipulation. My Las Vegas attorney will tell the court could you have executed the settlement agreement but that you will be visiting family out of state and that as far as we are concerned you need not attend the hearing on Monday. Does this sound okay? Can you send me these documents?

1 J. BRUCE ALVERSON, ESQ.

2 Nevada Bar No. 1339

3 KARIE N. WILSON, ESQ.

4 Nevada Bar No. 7957

5 **ALVERSON TAYLOR**

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25 TECHNOLOGIES L.L.C., a Texas Limited

26 Liability Company, and NAGRASTAR L.L.C., a

27 Colorado Limited Liability Company,

28 Plaintiffs

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30 DARRYL POLO, aka "THEPIMP" and aka "DJP"

31 dba www.fta-spot.com, www.ftapimps.com, and

32 The Media Creative Group ("TMC")

33 Defendant

34

35 **[PROPOSED] ORDER GRANTING RELIEF FROM ORDER AND EXTENSION OF TIME**

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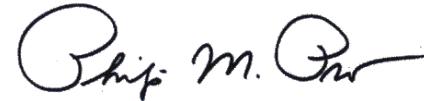
1 Having considered the Plaintiffs' Motion for Relief from Order and for Extension of Time
2 and the Plaintiffs' Memorandum and Declarations in Support of said Motion, the Court finds that the
3 Plaintiffs have set forth good cause for relief from the pertinent Order and for the extension of time
4 sought by the Plaintiffs such that the Court hereby **GRANTS** Plaintiffs' Motion and the Court's
5 Order of February 28, 2011 is amended and or superseded as follows:

6

1. The Parties shall have until April 22, 2011 to file settlement documentation;
2. The settlement documentation which may be filed shall include a Motion for Judgment by
3 Stipulation; and
3. Should the Defendant continue to fail to deliver the executed settlement documentation to
4 the Plaintiffs the Plaintiffs shall have the right to continue with the Civil Action, including
5 the right to file a Motion for the Clerk's entry of Default against the Defendant.

13 **IT IS SO ORDERED.**

14 DATED this 28th day of March, 2011.

15 
16

17

UNITED STATES DISTRICT COURT JUDGE